

Prepared Comments by Senator Pat Roberts  
Washington, DC  
Examining the Filibuster  
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Thank you, Mr. Chairman, for holding this hearing to examine the role of the Senate in the legislative process. I am currently in my third term as Senator, serving here for over thirteen years. Before this I served in the House of Representatives for eight terms, or sixteen years, as Congressman for Kansas' First District. As such, I have first-hand experience in both houses of Congress, their rules, and their respective Constitutional roles.

This hearing is about more than the filibuster, it is about the nature of the Senate and its function in the legislative process. It is clear that the founding fathers intended to create a system of checks and balances: the Legislative upon the Executive, the Judicial upon the Legislative, and even within the Congress, the Senate upon the House.

I served as a Congressman in both the majority and the minority. I can testify first hand, that the House is the institution for the will of the majority. However, I think it is useful to highlight some recent trends in House operations in order to distinguish the importance of the Senate.

From the 104<sup>th</sup> Congress through the 109<sup>th</sup>, a period of 12 years, the percentage of bills brought to the floor with open amendment rules ranged from 58 percent in the 104<sup>th</sup> to 19 percent in the 109<sup>th</sup>, with an average over the entire period of nearly 41 percent. By contrast, the number of bills with open amendment rules on the floor in the 110<sup>th</sup> Congress was 14 percent, and a paltry 1 percent as of March 19, 2010 in the current Congress, with an average of 7 and a half percent overall in three years and four months.

As the open amendment process atrophies in the House, the percentage of closed rules has soared. From the 104<sup>th</sup> Congress through the 109<sup>th</sup>, the percentage of bills brought to the floor with closed rules ranged from 14 percent in the 104<sup>th</sup> to 32 percent in the 109<sup>th</sup>, with an average over the period of 22 and a half percent. By contrast, the number of bills with closed rules on the floor in the 110<sup>th</sup> Congress was 36 percent, and an unprecedented 31 percent as of March 19, 2010 in the current Congress, with an average between the two of 33 and a half percent.

These numbers demonstrate the level of cooperation in the House has dropped precipitously. This is most striking because public opinion polls are overwhelmingly opposed to the legislation coming out of this Congress. In its most recent average of polling data from different sources, Real Clear Politics shows that nearly 53 percent of Americans are opposed to the recently passed Health Care Reform bill, and only 40 percent, roughly, are in favor of it. We could discuss other controversial proposals the American people oppose like Cap & Trade, federal bailouts, or deficit spending, but it might be easier to sum it all up in a Real Clear Politics average of polls on whether Americans feel the country is headed in the right direction. The most recent, averaged

poll show that 58 percent of Americans think we're on the wrong track, and only 37 percent, roughly, think we're on the right track. There is a clear disconnect between what the majority is pursuing and what the American people want.

To whom can the American people turn when the House majority runs roughshod over the minority party and public opinion? It is the Senate. The founding fathers had the foresight to create an institution that was based not on majority rule, but where each state regardless of size or population had two Senators to speak out on their behalf. It is that power to speak, the right to unlimited debate that is the hallmark of the Senate.

The 63<sup>rd</sup> Article from the Federalists Papers, attributed to James Madison, explains the necessity of the Senate as an institution that may "sometimes be necessary as a defense to the people... What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizen the hemlock on one day and statues on the next."

The filibuster is the essence of the Senate. It is not a tool of obstructionism or dysfunction. It is meant to foster greater consultation, consensus, and cooperation between the parties. It is a means for the minority to make its voice heard, and to contribute to the debate and amendment of legislation before the Senate. In this way, it is impossible to abuse the filibuster because it is an expression of the people against the majority's attempt to shut them out of the process.

Only in the House does majority take all, and as the numbers show, the majority appears to be taking more and more in the last few years. It is disheartening to see some members of the Senate, often new and unaccustomed to our culture of comity and compromise, attempt to rewrite the rules of this Chamber - to make it more like the House.

Cloture is an instrument to cut off debate when the majority is not interested in compromise. From the 107<sup>th</sup> through the 109<sup>th</sup> Congresses there was an average of roughly 48 cloture motions filed per Congress. In the 110<sup>th</sup> Congress alone there were 133. That is 133 instances of the majority seeking to cut off debate. It is a 177 percent increase over the average of the previous three Congresses. Of those 133 cloture motions, 98 were filed the moment the question was raised on the floor. That is, nearly 74 percent of cloture motions were filed before a debate was even allowed to take place. The average for the three previous Congresses was 29 times, or roughly 60 percent.

Moreover, we need to consider the times the majority brought a bill to the floor and used a parliamentary tactic called "filling the tree" to prevent the minority from offering amendments. From the 99<sup>th</sup> through the 109<sup>th</sup> Congress, a period of 22 years, the majority filled the tree a total of 36 times, averaging a little over 3 times per Congress. This contrasts sharply with the 110<sup>th</sup> through the present Congress, a period of roughly 3 years and four months, in which the majority filled the tree 26 times, with an average of 13 times per Congress, an increase of over 330 percent.

We could go on with other instruments that have been used by the majority to circumvent regular order, stifle the minority, and force unwanted legislation upon the people. They include abuse of the reconciliation process, bypassing committee through the use of Rule XIV, and the use of amendments between the Houses (also known as “ping-pong”) instead of conference committees to resolve differences in legislation.

Perhaps, Mr. Chairman, we can explore these in subsequent hearings on this topic.

The filibuster, the right of unlimited debate, is synonymous with the Senate. It is what the founders intended, and whoa to any member of the majority in this body who thinks it expeditious to change Rule XXII. No majority remains forever, and advocates of radical proposals should heed the words of my friend, and member of this committee, Senator Murray, who in April 2005 stood on the Senate floor and said, “We had an election last year... but that does not mean half the country lost its voice. That does not mean tens of millions of Americans will have no say in our democracy.”

Or perhaps the words of another member of this committee, Senator Durbin, who in April 2005 took the floor and said, “It is best when in doubt to stick with the traditions of the Senate. It is best when in doubt to stick with the filibuster, which requires compromise, requires bipartisanship, and moves us to a point where we can and must work together.”

Or perhaps, we should listen to the words of the late, great lion of the Senate, Senator Kennedy, who in May 2005 said, “The Senate’s rules have allowed the minority to make itself heard as long as necessary to stimulate debate and compromise, and even to prevent actions that would undermine the balance of powers, or that a minority of Senators strongly oppose on principle... In short, neither the Constitution, nor Senate Rules, nor Senate precedents, nor American history, provide any justification for selectively nullifying the use of the filibuster.”

Mr. Chairman, rather than pursue rule changes that undermine the Senate and the intentions of the founding fathers, and rather than painting the minority as obstructionists, perhaps we could try returning to the tradition of comity and compromise that earned this institution’s renowned reputation for being the greatest deliberative body in the world.

Thank you.